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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 PLAYSTUDIOS, INC.,

8 Plaintiff(s),

9 v.

10 CENTERBOARD ADVISORS, INC., et al.,

11 Defendant(s).

Case No. 2:18-CV-1423 JCM (NJK)

ORDER

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13 Presently before the court is plaintiff Playstudios Inc.'s ("plaintiff") objection/appeal from
14 Magistrate Judge Koppe's order granting in part and denying in part the second motion to compel
15 discovery. (ECF No. 69). Defendants Centerboard Advisors, Inc. and Josh Grant (collectively,
16 "defendants") filed a response (ECF No. 73).

17 Also before the court is plaintiff's motion to reconsider and vacate a portion of Magistrate
18 Judge Koppe's order. (ECF No. 70). Defendants filed a response. (ECF No. 74).¹

19 Also before the court is non-parties' objection/appeal from Magistrate Judge Koppe's order
20 denying plaintiff's motion to quash.² (ECF No. 81). Defendants filed a response. (ECF No. 83).

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26 ¹ Plaintiff's motion for reconsideration is identical to its objection/appeal. (*Compare* ECF
27 No. 69, *with* ECF No. 70). As a result, defendants' responses are identical. (*Compare* ECF No.
28 73, *with* ECF No. 74).

² Twenty-seven non-parties retained plaintiff's counsel to contest the subpoenas
defendants served on them. (ECF No. 75 at 2).

1 Also before the court is non-parties' motion for reconsideration of Magistrate Judge
2 Koppe's order denying plaintiff's motion to quash. (ECF No. 82). Defendants filed a response.
3 (ECF No. 83).³

4 Also before the court is plaintiff's motion for leave to file a reply. (ECF No. 87).

5 **I. Background**

6 The instant action arises from a breach of contract. (ECF No. 1-1). Plaintiff, a mobile
7 games company, agreed to pay defendants for a variety of consulting services. *Id.* at 5. Plaintiff
8 paid defendants a \$50,000 deposit. *Id.* at 6. Plaintiff alleges that defendants "materially failed to
9 perform under the terms of the [a]greement" *Id.* As a result of this purported failure, plaintiff
10 filed the instant action for breach of contract, breach of the implied covenant of good faith and fair
11 dealing, fraud, and unjust enrichment. *Id.* On the other hand, defendants allege that plaintiffs did
12 not pay them as required by the contract. (ECF No. 33). Consequently, defendants filed
13 counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing,
14 fraud, and unjust enrichment. (ECF No. 33).

15 The various motions before the court pertain to two discovery disputes. First, plaintiff
16 argues that it should not be compelled to provide certain business performance and financial
17 records to defendants. (ECF Nos. 69). Next, 27 non-parties argue that the defendants' third-party
18 subpoenas should be quashed because they impose an undue burden. (ECF No. 81).

19 **II. Legal Standard**

20 Magistrate judges are authorized to resolve pretrial matters subject to district court review
21 under a "clearly erroneous or contrary to law" standard. 28 U.S.C. § 636(b)(1)(A); *see also* Fed.
22 R. Civ. P. 72(a); LR IB 3-1(a) ("A district judge may reconsider any pretrial matter referred to a
23 magistrate judge in a civil or criminal case pursuant to LR IB 1-3, where it has been shown that
24 the magistrate judge's ruling is clearly erroneous or contrary to law."). "A finding is clearly
25 erroneous when although there is evidence to support it, the reviewing body on the entire evidence
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28 ³ Plaintiff's motion for reconsideration is identical to its objection/appeal. (*Compare* ECF
No. 81, *with* ECF No. 82). Defendants' single response addresses both of plaintiff's filings.

1 is left with the definite and firm conviction that a mistake has been committed.” *United States v.*
2 *Ressam*, 593 F.3d 1095, 1118 (9th Cir. 2010) (internal quotation marks omitted).

3 **III. Discussion**

4 As an initial matter, the court denies plaintiff’s and non-parties’ motions to reconsider as
5 moot in light of this order addressing their respective objections/appeals.

6 *A. Objection to the order granting in part and denying in part the second motion to compel* 7 *discovery*

8 Plaintiff objects only to the portion of Magistrate Judge Koppe’s order that compels it to
9 produce financial and business performance records. (ECF No. 69). Put simply, plaintiff argues
10 that it should not be compelled to turn over financial and business performance records because it
11 does not believe the records are relevant to defendants’ claims or defenses. (ECF No. 69). The
12 court disagrees.

13 Federal Rule of Civil Procedure 26 governs discovery’s scope and limits and is liberally
14 construed. *Seattle Times, Co. v. Rhinehart*, 467 U.S. 20, 34 (1984); *see also* Fed. R. Civ. P.
15 26(b)(1). “[B]road discretion is vested in the trial court to permit or deny discovery.” *Hallett v.*
16 *Morgan*, 296 F.3d 732, 751 (9th Cir. 2002); *see also Crawford-El v. Britton*, 523 U.S. 574, 598
17 (1998).

18 Although discovery is limited to any nonprivileged matter that is relevant to any party’s
19 claim or defense and is proportional to the needs of the case, the “[i]nformation . . . need not be
20 admissible in evidence to be discoverable.” Fed. R. Civ. P. 26(b)(1). “Where inquiry into a party’s
21 financial condition is of only marginal relevance and based on speculative assertions, however, the
22 court may in its discretion deny such discovery.” *Dinkins v. Schinzel*, No. 2:17-cv-01089-JAD-
23 GWF, 2018 WL 456876, at *2 (D. Nev. Jan. 17, 2018) (citations omitted).

24 The court’s holding in *Dinkins* is instructive. In *Dinkins*, the court compelled the plaintiff
25 to produce his tax returns “in their entirety” because the plaintiff’s financial condition was relevant
26 to the defendant’s fraud, breach of contract, breach of covenant of good faith and fair dealing,
27 defamation, and invasion of privacy claims. *Id.* at *2. However, the court did not compel plaintiff
28 to produce profit and loss statements and bank records because the defendant sought that

1 information only “for the purpose of verifying [p]laintiff’s income tax returns and his income.”
2 *Id.* The court held that “[t]he relevance of the profit and loss statements and bank records [was]
3 not readily apparent and [d]efendant [did] not sufficiently set forth how they [were] relevant to her
4 claims or defenses.” *Id.*

5 Here, defendant argues that plaintiff’s financial records are relevant to proving its intent,
6 and essential element of defendant’s fraud-based affirmative defense and counterclaim. (ECF Nos.
7 73 at 3). Defendant further argues that its offset defense, unjust enrichment claim, and its theory
8 of damages “can be proven . . . by comparing [plaintiff’s] financial and business performance
9 before and after [d]efendants’ tenure.” *Id.*

10 Magistrate Judge Koppe did not err by concluding that plaintiff’s business performance
11 and financial reports were akin to the tax returns in *Dinkins*, which were relevant to the claims and
12 defenses presented in the case. The court finds that, unlike the profit and loss statements and bank
13 records in *Dinkins*, the financial information defendants seek in this case is essential to proving
14 the defendants’ claim of unjust enrichment at the very least. Indeed, defendant must provide
15 evidence to prove its unjust enrichment claim, which necessarily requires the defendant to prove
16 that plaintiff was enriched.

17 Plaintiff argues that the records invite speculation regarding what caused its financial
18 performance because “[t]he link between defendants’ work, whatever that work may have been,
19 and [plaintiff’s] financial performance cannot be reduced to straight line.” (ECF No. 69 at 6–7).
20 Defendant counters that “[i]t is for the jury to decide whether or not [plaintiff’s] improved
21 performance arose in whole or in part from the business consulting and other strategic advice it
22 fraudulently induced [d]efendants to provide.” (ECF No. 73 at 4).

23 The court finds that plaintiff’s argument is one of proof, not of relevance. Indeed,
24 defendant correctly argues that “[t]o reach a fair and informed conclusion, the factfinder must be
25 presented with the evidence.” (ECF No. 73 at 4). Thus, plaintiff is compelled to turn over the
26 financial records at issue and is free to argue the weight or admissibility of that evidence in an
27 appropriate motion or at trial.

28 Accordingly, plaintiff’s objection/appeal is denied.

1 *B. Objection to the motion to quash*

2 As an initial matter, the court grants plaintiff's motion for leave to file a reply. (ECF No.
3 87). Although the court has reviewed plaintiff's proposed reply and finds that it amounts to little
4 more than having the last word in what has become an ongoing feud between the parties, the court
5 nonetheless finds some of the factual assertions therein helpful to the resolution of the instant
6 dispute. (*See* ECF No. 87-1).

7 To be sure, the court has reviewed plaintiff's objection/appeal (ECF No. 81) and
8 defendants' response (ECF No. 83) and found them both replete with—at worst—omissions,
9 misstatements, and mischaracterizations of both law and fact or—at best—irreconcilable
10 differences between the parties' perception of how discovery in this case has progressed. The
11 court will separate the wheat from the chaff.

12 In its reply, plaintiff contends that "Magistrate Koppe's order of July 19 upheld the
13 subpoenas without alteration" such that "the [n]on-parties must produce materials they exchanged
14 with defendants when even defendants themselves concede that this request is impermissibly
15 cumulative and duplicative. The order should be remanded for this reason alone." (ECF No. 87-1
16 at 8). The court notes defendants' representation that they "ha[ve] withdrawn the subpoena
17 requests for communications exchanged with themselves." (ECF No. 83 at 3 n.3). Nothing in
18 Magistrate Judge Koppe's order denying the motion to quash indicates that the non-parties are
19 obligated to comply with the now-withdrawn portion of the subpoenas. (*See generally* ECF No.
20 75). The non-parties need not turn over information they exchanged with defendants. Thus, the
21 court considers whether the subpoenas—without the request to produce documents exchanged
22 with defendants—should be quashed.

23 Rule 45(c)(3) provides that a court "must quash or modify a subpoena" if the subpoena
24 "subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iv). Third-party discovery uses
25 the same undue burden standard as that used regarding discovery served on parties to the
26 litigation. *See Mount Hope Church v. Bash Back!*, 705 F.3d 418, 429 (9th Cir. 2012).

27 "The party who moves to quash a subpoena bears the 'burden of persuasion' under Rule
28 45(c)(3)." *ATS Prods. v. Champion Fiberglass, Inc.*, 309 F.R.D. 527, 531 (N.D. Cal. 2015) (citing

1 *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005)). Thus, the moving party “must
2 ‘allege specific facts which indicate the nature and extent of the burden, usually by affidavit or
3 other reliable evidence.’” *Nationstar Mortg., LLC v. Flamingo Trails No. 7 Landscape Maint.*
4 *Ass’n*, 316 F.R.D. 327, 334 (D. Nev. 2016) (quoting *Jackson v. Montgomery Ward & Co.*, 173
5 F.R.D. 524, 529 (D. Nev. 1997)). “Conclusory or speculative statements of harm, inconvenience,
6 or expense are plainly insufficient.” *Id.* (citing *U.S. E.E.O.C. v. Caesars Entertainment*, 237
7 F.R.D. 428, 432 (D. Nev. 2006)).

8 The non-parties advance three arguments in favor of quashing the subpoenas. First, the
9 non-parties contend that the least intrusive means of obtaining the information is to get it from
10 plaintiffs. (ECF No. 81 at 7–11). Second, the court should quash the subpoenas because they
11 impose an undue burden on the non-parties. *Id.* at 11–14. Third, the non-parties believe that the
12 27 subpoenas constitute “scorched-earth” discovery conduct. *Id.* at 14–16.

13 The court finds the non-parties’ first argument unavailing. Defendants represent to the
14 court that plaintiff “initially committed to provide discovery from the [n]on-[p]arties but insisted
15 weeks later that (a) the [n]on-[p]arties’ documents were not within [plaintiff’s] possession,
16 custody, or control, and (b) Rule 45 subpoenas must issue.”⁴ (ECF No. 83 at 12).

17 Magistrate Judge Koppe did not err when she held “that [d]efendants demonstrated that
18 they sought other means to obtain the materials and that they do not already possess the
19 information.” (ECF No. 75 at 5). Indeed, plaintiff told defendants that “the devices used by the
20 [n]on-parties were owned by the [n]on-parties themselves, rather than issued by [plaintiff].” (ECF
21 No. 87-1 at 7). Further, defendants represent as follows:

22 [Plaintiff’s] Rule 30(b)(6) designee . . . testified that [plaintiff]
23 failed to preserve numerous sources of relevant evidence, resulting
24 in their loss; intentionally wiped at least one . . . witness’s company-
25 issued computer after filing suit; failed to conduct an adequate
26 search for materials in response to [d]efendants’ requests; and
27 engaged in other serious discovery misconduct.

28 ⁴ In its reply, plaintiff disputes this characterization. (ECF No. 87-1 at 6–9). Plaintiff
claims that defendants “hastily went after 27 [n]on-parties to circumvent the proper discovery
process and, more egregiously and primarily, to disrupt the [n]on-parties’ lives and drive a wedge
between the [n]on-parties and [plaintiff].” *Id.* at 9.

1 (ECF No. 83 at 7). Thus, it is not unreasonable for defendant to subpoena the information and
2 evidence admittedly not in plaintiff's control. Magistrate Judge Koppe did not commit clear error
3 by denying the motion to quash.

4 The non-parties' second argument is similarly unpersuasive. The non-parties believe that
5 the subpoenas impose an undue burden because they seek information not relevant to the claims
6 and defenses in this case. (ECF No. 81 at 13). Non-parties contend that the materials sought by
7 the subpoenas "skirt the core of the defendants' pleadings as they have plead[ed] them" and
8 "provid[e] no illumination about their claims for fraud, breach of contract, breach of the implied
9 covenant, and unjust enrichment" *Id.* at 14. In sum, the non-parties contend that "this
10 discovery does not warrant the burdens it places on the non-parties." *Id.*

11 The court finds that the information requested has some probative value. All of the non-
12 parties have been listed in initial disclosures "as being in possession of relevant information upon
13 which [plaintiff] intends to rely at trial." (ECF No. 83 at 9). The subpoenas request
14 "communications regarding [d]efendants, including assessments of their performance and the
15 strategies they proposed to impose [plaintiff's] performance." *Id.* These communications may
16 demonstrate the benefit plaintiff received from defendant, an essential element of unjust
17 enrichment. If the communications indicate that defendant adequately performed under the
18 parties' agreement, this would be highly relevant to the defense against plaintiff's breach of
19 contract claim.

20 On one hand, there is a possibility of discovering highly probative evidence. On the other
21 hand, the court finds a conspicuous omission from the non-parties' objection: any discussion of
22 what burden the subpoenas impose on them. *See generally id.* The non-parties do not provide any
23 specific facts to indicate the nature and extent of the burden. *See Nationstar Mortg., LLC*, 316
24 F.R.D. at 334. Instead, the court is left with conclusory and speculative statements of harm,
25 inconvenience, and expense. These allegations do not justify quashing the subpoenas. *Id.*

26 Magistrate Judge Koppe did not clearly err by finding that the non-parties did not
27 demonstrate an undue burden. (ECF No. 75 at 5).

1 Lastly, the court finds the non-parties’ final argument unpersuasive. The court notes that
2 the non-parties’ “scorched-earth” argument is entirely contingent upon the attorneys’ fees that
3 plaintiff and defendant have incurred in this case, not the non-parties.⁵ (See ECF No. 81 at 14–
4 15). The distinction between the non-parties and plaintiff grows tenuous as their shared counsel
5 makes sweeping arguments regarding the greater scope of discovery in this case. *Id.*

6 But the non-parties nonetheless contend that “[t]his is a small case with an extremely small
7 timeline.” (ECF No. 81 at 15). Thus, the court finds that the “extremely small timeline” ought to
8 reduce the cost and burden to the non-parties. After all, there is only a small temporal window—
9 one month—for the non-parties to sift through to find the evidence and information requested by
10 the third-party subpoenas.

11 Thus, Magistrate Judge Koppe correctly denied the motion to quash. The non-parties’
12 objection/appeal is denied.

13 **IV. Conclusion**

14 Accordingly,

15 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiff’s
16 objection/appeal from Magistrate Judge Koppe’s order ruling on the second motion to compel
17 discovery. (ECF No. 69). be, and the same hereby is, DENIED.

18 IT IS FURTHER ORDERED that plaintiff’s motion for reconsideration of Magistrate
19 Judge Koppe’s order (ECF No. 70) be, and the same hereby is, DENIED as moot.

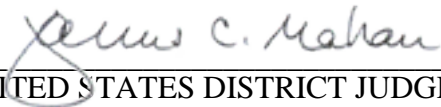
20 IT IS FURTHER ORDERED that non-parties’ objection/appeal from Magistrate Judge
21 Koppe’s order ruling on the second motion to compel discovery (ECF No. 81) be, and the same
22 hereby is, GRANTED in part and DENIED in part, consistent with the foregoing.

23 IT IS FURTHER ORDERED that non-parties’ motion for reconsideration of Magistrate
24 Judge Koppe’s order (ECF No. 82) be, and the same hereby is, DENIED as moot.

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27 ⁵ Notably, defendants are quick to point the finger at plaintiff, claiming that plaintiff is
28 engaging in “a deliberate campaign designed to exhaust [d]efendants’ resources because neither
the facts nor the law support [plaintiff].” (ECF No. 83 at 9). For the purposes of the instant appeal,
the court need not—and will not—indulge the parties’ continued quibbling.

1 IT IS FURTHER ORDERED that plaintiff's motion for leave to file a reply (ECF No. 87)
2 be, and the same hereby is, DENIED.

3 DATED December 3, 2019.

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5 UNITED STATES DISTRICT JUDGE
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